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## **Brexit and State Aid Control: Four Quartets.**

Andrea Biondi \*

### **Introduction: The Brexit Time Machine.**

Brexit is a process replete with dates, deadlines and timelines, such as the UK's 45 years of EU membership, the European Communities Act 1972, the two year period within which a Withdrawal Agreement must be agreed, the date of 'Brexit day' being 29 March 2019, and now December 2020 as the likely end date of a possible transition period. In an imaginary time machine, Brexit is therefore taking the UK one step forward, and another step back, so that the timeline turns from the horizontal to the spherical, turning back on itself to form a loop. Wherever one's political affiliations or personal orientations lie, this closed time curve requires us to go back in time and reconsider the reasons why a transfer of powers to the supranational organisation was deemed to be a necessity, or even desirable, in the first place. It also requires an assessment of the positives and negatives that this decision has produced. The curve then moves us forward in time, to another crucial decision on if, what and how certain aspects and effects of the previous decision should be retained after leaving the EU. This article will try to follow the state aid regulation curve, with a little help from poetry,<sup>1</sup> to highlight why rules on public spending are necessary in a modern economy. It will then venture a few considerations on a probable future scenario concerning what kind of regulatory model the UK could adopt following its exit from the EU.

### **1. The 1<sup>st</sup> Quartet: 'Time past and time future allow but a little consciousnesses'**

The Port Talbot area in south Wales is forever associated with steel and, unfortunately, with pollution. It is the home of the Port Talbot Steelworks, one of the biggest steel plants in Europe, if not the world. It employs around 10% of the town's population, and it is said to be able to produce nearly 5 million tonnes of steel per annum. On 30 March 2016, the Tata Steel company that owns the plant announced that it was pulling out of its UK operations.<sup>2</sup> Plans to find new owners were confusedly patched together, but produced no immediate results.<sup>3</sup>

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\* Professor of EU Law and Director Centre of European Law, King's College London; Academic Associate at 39 Essex Chambers, London.

<sup>1</sup> With many apologies to TS Eliot, *Four Quartets*, (Faber & Faber, 2001 Ed.).

<sup>2</sup> See G. Ruddick and H. Stewart, 'Tata Steel to sell off entire British business', *The Guardian* (30 March 2016), available at: <https://www.theguardian.com/business/2016/mar/29/tata-set-to-announce-sale-of-uk-steel-business-port-talbot> (accessed 20 May 2018).

<sup>3</sup> A rescue plan for the Port Talbot steelworks was a subsequently agreed, with plans for significant new investment: see M. Pooler and J. Pickard, 'Tata and unions agree rescue plan for Port Talbot steelworks', *Financial Times* (7 December 2016), available at: <https://www.ft.com/content/2aada674-bc9a-11e6-8b45-b8b81dd5d080> (accessed 20 May 2018) and A.

On 23 June 2016, of the 75,694 votes cast in the EU Referendum in Neath Port Talbot (the voting area that included Port Talbot), those in favour of remaining in the EU were 32,651, while the total number of votes cast in favour of leaving the EU was 43,001.<sup>4</sup> Port Talbot, by a 56% majority, chose Brexit amid recriminations about money going to Europe, a lack of protection from unfair competition from China and opinions that EU state aid law prevented the UK Government from bailing out the plant.<sup>5</sup> Port Talbot consequently became symbolic of what was said to be wrong with EU state aid regulation and, in the aftermath of the referendum, state aid was singled out by all political parties as one of the areas which was in most need of reform. On occasion a complete abolition of the state aid rules was suggested.

The EU system of control of state aid was specifically identified as a ‘problem’ in two, opposing, respects: first, because it frustrates more market oriented national policies of liberalization and deregulation, by constraining policies into a bureaucratic and rigid cage;<sup>6</sup> and, second, because it prevents the pursuit of socially oriented economic policies, as it simply negates any role for the state in pursuing these particular policies.<sup>7</sup> The common denominator between these two very different takes is that EU state aid control is an excessive interference in national economic policies.

Although the state aid system is far from perfect, if one briefly moves back in time these very sharp criticisms of state aid control seem to be rather misconceived. The EU system of state aid rules were certainly among the most innovative of the provisions of the Treaty of Rome, which created the European Economic Community, comprised of six post-Second World War industrialist states, which had economies dominated by public enterprises, yet still decided to introduce stringent rules controlling public spending.<sup>8</sup> The structure of the Treaty has essentially remained the same since 1957, being based on ‘prohibit first, repent later’ rationale. What is now Article 107(1) TFEU contains a straightforward prohibition that “*any aid granted by a Member State or through*

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Tovey, ‘Tata workers vote for pension cut to rescue steel-making in Britain’, *Daily Telegraph* (15 February 2017), available at: <https://www.telegraph.co.uk/business/2017/02/15/tata-workers-vote-pension-cut-rescue-steel-making-britain/> (accessed 20 May 2018).

<sup>4</sup> Declaration of result for the Neath Port Talbot voting area, available at: [https://www.npt.gov.uk/media/5461/declaration\\_of\\_result.pdf](https://www.npt.gov.uk/media/5461/declaration_of_result.pdf) (accessed 20 May 2018).

<sup>5</sup> F Araujo, ‘Hard Brexit Threatens Welsh Steel but Port Talbot leavers show no regrets’, *The New Statesman*, 1 March 2018, <https://www.newstatesman.com/politics/economy/2018/03/hard-brexith-threatens-welsh-steel-port-talbot-s-leavers-have-no-regrets> (accessed 20 May 2018).

<sup>6</sup> See HM Government Green Paper, *Building our Industrial Strategy* (January 2017), available at [https://beis.gov.uk/citizenspace.com/strategy/industrial-strategy/supporting\\_documents/buildingourindustrialstrategygreenpaper.pdf](https://beis.gov.uk/citizenspace.com/strategy/industrial-strategy/supporting_documents/buildingourindustrialstrategygreenpaper.pdf) (accessed 20 May 2018), which included proposals of ‘cultivating world-leading sectors’ through ‘sector deals’.

<sup>7</sup> See R. Tuck, ‘The Left Case for Brexit’, *Dissent* (6 June 2016), available at: <https://www.dissentmagazine.org/author/richard-tuck> (accessed 20 May 2018).

<sup>8</sup> M Merola, ‘The Forces Shaping State Aid Control in the EU’, in L. Rubini & J. Hawkins (eds) *What Shapes the Law? Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines*, (EUI/University of Birmingham, 2016), 101, available at: [http://cadmus.eui.eu/bitstream/handle/1814/42404/WhatShapesLaw\\_2016.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/42404/WhatShapesLaw_2016.pdf?sequence=3) (accessed 20 May 2018).

*State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*". Only after aid granted in contravention of this prohibition is permitted, can Member States claim that an aid measure could be compatible with EU law, because it pursues certain objectives for the common good. Famously, the job of supranational referee in charge of 'surveillance' of the entire system was conferred on the European Commission ("**the Commission**") by what is now Article 108 TFEU.

The introduction of state aid control in the Treaty was thus an essential tool for the achievement of a common market, by preventing participating states from adopting protectionist measures, and by providing a neutral forum for the avoidance of subsidies wars. Curiously, it has been mainly thanks to the influence of the UK that state aid control gradually became something different, and is now also perceived as an instrument of market efficiency and competition. From Commissioner Leon Brittan's tough stance on enforcement, continuing with Gordon Brown's push for a reform of state aid control geared towards a more 'economic' approach, the focus gradually moved to state aid rules being considered as tools for guaranteeing a level playing field in the market place. State aid rules were then perceived as essential in preventing the waste of public resources on policies, or on undertakings, that the market would never support. The UK always insisted on using state aid rules to prevent the survival of inefficient and unproductive industries, which would otherwise be detrimental to more efficient operators.<sup>9</sup> On the whole, one can safely argue that this is now broadly the approach taken by the EU institutions. For example, and to provide a snapshot, it is interesting to note the progressive elevation of the market operator principle from a criterion to determine the compatibility of national measures, to a constitutive and essential criterion in determining if a national measure should be classified as aid.<sup>10</sup> As reaffirmed in its recent Notice on the notion of State Aid, the Commission considers that:

*"it is not relevant whether the intervention constitutes a rational means for the public bodies to pursue public policy (for example employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public bodies acted, as a market economy operator would have done in an analogous situation. If this is not the case, the beneficiary undertaking has received an economic advantage, which it would not have obtained under normal market conditions, placing it in a more favourable position compared to that of its competitors."*<sup>11</sup>

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<sup>9</sup> See, for example, Department for Business, Energy & Industrial Strategy *What state aid is and how public authorities can make sure they comply with the rules*: (10 July 2015), available at: <https://www.gov.uk/guidance/state-aid> (accessed 20 May 2018).

<sup>10</sup> See, for example, Case C-124/10 P *Commission v EDF*, ECLI: EU: C: 2012:318.

<sup>11</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C 262/18.

The Court of Justice has also been vigilant in requiring the Commission to strictly monitor the ‘*inherent economic rationality of a state measure*’.<sup>12</sup> As is now standard *dicta*, state aid is therefore an expression of the “*essential task of ensuring that competition in the internal market is not distorted*”.<sup>13</sup> Furthermore, with the implementation of the Commission’s State Aid Modernization Plan strategy,<sup>14</sup> which included the adoption of the General Block Exemption Regulation (“**GBER**”),<sup>15</sup> state aid control went through a form of revolution, switching from a system of *ex ante* control, based on the duty to notify aid measures to the Commission and on the need to wait for a green light before implementation, to one of *ex post* control, whereby certain kinds of economic policies (such as research innovation, to risk capital, broadband, regional aid, aviation, energy, and the environment) are all considered worthy areas in which States can invest and are deemed, within certain pre-defined limits, to be ‘good’ aid *per se*, meaning they do not need to be notified to the Commission for approval.<sup>16</sup>

The adherence to market-friendly criteria does not, however, prevent the pursuit of progressive socially oriented policies. The Treaty itself offers, in Article 107(3) TFEU, wide possibilities to make aid compatible with EU law, listing a series of grounds on which aid can be compatible and thus lawful. Consequently, it is abundantly possible for Member States to show that even measures that involve a degree of selective financial support are fully justified in pursuance of the general interest. The UK has been one of the most successful Member States in dealing with such state aid control, with a majority of domestic policies notified to the Commission being found to be compatible.<sup>17</sup>

<sup>12</sup> Case C-579/16 *Commission v FIH Holding* ECLI: EU: C: 2018:159, at para 63.

<sup>13</sup> Case C184/11 *Commission v Spain* ECLI: EU: C: 2014:316.

<sup>14</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2012) 209 Final (8 May 2012). For a list of the measures adopted see: [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html) (accessed 20 May 2018).

<sup>15</sup> Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L 187/1, as amended by Commission Regulation (EU) No 2017/1084, OJ 2017 L 156/1. See also the so-called SGEI package, a series of measures adopted by the European Commission that clarifies the application of state aid law to SGEIs, in particular the conditions under public service compensation should not be considered as aid. Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, Official Journal C8, 11.01.2012, p. 4-14; Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, Official Journal L7, 11.01.2012, p. 3-10; Communication on the European Union framework for State aid in the form of public service compensation(2011)Official Journal C8, 11.01.2012, p. 15-22 and Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, Official Journal L 114 of 26.4.2012, p. 8.

<sup>16</sup> The emphasis on market efficiency and horizontal virtuous policies fits the UK economic model very well, where selective industrial policies, at least until the Coalition government, were rare. See further N Crafts, *Brexit and State aid*, (2017) 33 Oxf. Rev. Econ. Policy 105.

<sup>17</sup> See the data reported in A. Biondi, ‘State Aid, government spending and the virtue of loyalty’, in P. Birkinshaw & A. Biondi (eds.) *Britain Alone?* (Kluwer, 2016), 291.

Arguably, although the notion of ‘aid’ is supposed to be an objective notion, the Court of Justice itself has also pragmatically recognized that some delimitation of what constitutes state aid might be necessary so as not to undermine national policies pursuing interests worth protecting. For instance, in *Paint Graphos*, the Court found that the differences between the fiscal treatment applied to producers’ and workers’ cooperative societies could not be considered as state aid, because cooperatives were not in a comparable factual and legal situation to that of commercial companies.<sup>18</sup> Similarly, and most recently, in a case dealing with a system of progressive tax criterion based on the size of the establishment that resulted in a tax exemption for small businesses, the Court of Justice first agreed with the Spanish government that the purpose of the tax in question was to contribute towards environmental protection and town and country planning, because it attempted to correct and counteract the environmental and territorial consequences of the activities of large retail establishments. It also held that the measure was not selective in nature, and therefore it was not aid under Article 107(1) TFEU, because small businesses were not in a comparable situation to large retailers.<sup>19</sup>

## **2. The Second Quartet: ‘In my beginning is my end’**

Once EU state aid control is brought back to its proper milieu, the question remains as to what extent state aid rules should be preserved in a post-Brexit era. As with many other areas of the UK’s disentanglement from the EU, a final settlement should be agreed by both sides ideally by dividing “*half a sheet of paper by a line into two columns, writing over the one Pro, and over the other Con.*”<sup>20</sup> When the time eventually comes to start negotiating the future relationship between the EU and the UK, the two sides might, however, have different views as to both the pros and the cons.

As for the UK, its government has insisted that it will seek a bespoke agreement that will forge a ‘deep and special partnership’, which should mean an agreement that might guarantee deeper integration in the EU market than that afforded to third countries by existing free trade agreements concluded by the EU.<sup>21</sup>

The EU position is contrarily concerned that the Brexit process will simply create regulatory competition, particularly insidious, as it would come from a large country that is geographically close and interlinked with the European economy. The EU has always insisted that any future agreement should ensure a level playing field (“LPP”), that all players play by the same rules. Therefore, the European Council Guidelines of 29 April 2017 state very clearly that “*any free*

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<sup>18</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos and others*, ECLI: EU: C: 2011:550.

<sup>19</sup> Joined Cases C-233 to C-237/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* ECLI: EU: C: 2017:854.

<sup>20</sup> B. Franklin, Letter to the English chemist Joseph Priestley, (19 September 1772), available at <https://founders.archives.gov/documents/Franklin/01-19-02-0200> (accessed 20 May 2018).

<sup>21</sup> See Chancellor of the Exchequer, Philip Hammond and Secretary of State for Exiting the European Union, David Davis, *A deep and special partnership*, at <https://www.gov.uk/government/news/joint-article-a-deep-and-special-partnership> (accessed on 6 June 2018).



*trade agreement should be balanced', ambitious and wide-ranging ... A level playing field must be ensured, notably in terms of competition and state aid, and in this regard, encompass safeguards against unfair competitive advantages through, inter alia, tax; social, environmental and regulatory measures and practices."*<sup>22</sup> In January 2018, the reaffirmed that the LPF is a 'horizontal' principle that cuts across different policy areas, and according to the Commission, mainly concerns competition "*and state aid, social and environmental standards, taxation, other regulatory measures and practices*"<sup>23</sup> implying that a narrow sectorial approach would not work.

The UK government has gradually appeared to accept that some form of state aid control would be needed. Eventually, Prime Minister Theresa May, in her Mansion House speech on 2 March 2018, indicated that "*the UK has much to gain from maintaining proper disciplines on the use of subsidies and anti-competitive practices*".<sup>24</sup> Significantly, Andrew Griffiths MP, Minister for Small Business, Consumers & Corporate Responsibility, confirmed that "*the Government's view therefore is that the UK should be prepared to establish a full, UK-wide subsidy control framework, with a single UK body for enforcement and supervision, at the point this is required*".<sup>25</sup>

### **3. The Third Quartet: 'there is no end but addition'**

The next question is, what form could a future UK model of state aid control take?<sup>26</sup> Any future system should be built around three interlinked pillars: first, substantive provisions; second, an enforcement authority; and, third, a dispute settlement system.<sup>27</sup>

#### **3.1 Future substantive provisions: 'a full, UK-wide subsidy control framework'**

The first, and somehow easiest, option would be to simply fall back on the WTO's rules on subsidies, which of course will continue to apply to the UK by virtue of

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<sup>22</sup> European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017, available at <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines> (accessed 20 May 2018), para. 20.

<sup>23</sup> European Commission, *Slides on Level Playing Field*, TF50 (2018) 27 - Commission to EU 27. (31 January 2018), slide 5, available at [https://ec.europa.eu/commission/sites/beta-political/files/level\\_playing\\_field.pdf](https://ec.europa.eu/commission/sites/beta-political/files/level_playing_field.pdf) (accessed 20 May 2018).

<sup>24</sup> Rt Hon Theresa May MP, *Our future economic partnership with the European Union* (2 Marc 2018), available at <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union> (accessed 20 May 2018).

<sup>25</sup> Andrew Griffiths MP, *Letter to House of Lords Internal Market Sub-Committee* (28 March 2018), available at <https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/brexit-competition/Letter-Andrew-Griffiths-to-Rt-Hon-Lord-Whitty-State-aid.pdf> (accessed 20 May 2018), in reply to House of Lords European Union Internal Market Sub-Committee, *Brexit: competition and State aid* HL Paper 67. (2 February 2018), available at <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/67/67.pdf>.

<sup>26</sup> Some of the ideas contained in this section are based on the author's written evidence to the House of Lords European Union Internal Market Sub-Committee, cit. above fn n.25.

<sup>27</sup> European Commission, *Slides on Level Playing Field* (fn.23), slide 7.

its autonomous membership of the WTO.<sup>28</sup> It is questionable whether this would be a rational choice for the UK, and whether, if this position was adopted, it could represent a stumbling block to further negotiations with the EU. WTO rules, despite apparently offering additional flexibility,<sup>29</sup> might, arguably, be of limited application and would not provide the government, and business operators especially, with sufficient legal certainty.

Two strenuous rounds of WTO negotiations (the Tokyo and the Uruguay Rounds) produced the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), one of the very few international agreements with no preamble at all.<sup>30</sup> Some suggested this was because the drafters decided that it would have been impossible to agree on its object and purpose.<sup>31</sup> Several WTO Dispute Settlement Panel and Appellate Body decisions have gradually clarified that the aim of the SCM Agreement is to impose '*multilateral disciplines on subsidies that distort international trade or to reduce economic distortion caused by subsidies*'.<sup>32</sup> Nonetheless, even if such a rationale is agreed, the SCM Agreement still has a limited scope.<sup>33</sup> The definition of 'subsidy', contained in Article 1, requires a measure to be classified as such by either being directly taken by governments, or attributable to them, and by being a grant of a specific advantage to an undertaking. These criteria are still going through several interpretations before the WTO Appellate Body<sup>34</sup>, but whatever such a hermeneutic activity might eventually produce, the rules still only apply to trade in goods, and they mainly prohibit export subsidies and import substitution subsidies. Furthermore, to obtain a decision terminating the subsidy, the existence of serious prejudice to the interests of another WTO member, 'as well as the impairment of market access, needs to be proven.

Two further limitations of the WTO system of controlling subsidies should also be highlighted. First, the SCM Agreement is based on a system of prior notification, which in theory should be used to pre-empt any possible distortive impact a subsidy may have. However, the various reports on compliance with the notification mechanisms are usually discouraging. For instance, in 2015, 79 members completely failed to notify any measure, and many of these members

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<sup>28</sup> The UK, together with the EU and all other Member states signed the Marrakesh Agreement establishing the World Trade Organization on 15 April 1994, Vol. 1867, 1-31874 United Nations, Treaty Series, Nations Unies — Recueil des Traités 1995. Although there seems to be no disputes about UK membership there will be certainly negotiations with other WTO members about the terms of membership and the commitments the UK makes in the WTO.

<sup>29</sup> A. Weiberger, 'State Aid Regulations after Brexit: A Good Deal for the UK?' in J.A. Hillman & G.N. Horlick (eds.), *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union* (Institute of International Economic Law, 2017), 88.

<sup>30</sup> Agreement on Subsidies and Countervailing Measures, 1869 U.N.T.S. 14.

<sup>31</sup> M. Cartland, G Depayre and J Woznoswky, *Is something wrong in the WTO dispute settlement?* (2012) 46(5), *Journal of World Trade* 979 at 992.

<sup>32</sup> Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, para 7.26.

<sup>33</sup> See further L. Rubini, *The Definition of Subsidy and State Aid*, (Oxford University Press, Oxford, 2009) esp. chapter 4.

<sup>34</sup> See e.g. Appellate Body Report US- Anti Dumping and Countervailing Duties (China) WT/DS379/AB/R, 25 March 2011 and Panel Report. EC and certain Member States-Large Civil Aircraft, WT/DS353 23 of March as modified by Appellate Body Report WT/DS353/AB/R.



have either never so notified, or have done so only in the distant past.<sup>35</sup> Second, and contrary to WTO rules, the SCM Agreement does not contain any specific rules on how to balance the grant of a possibly distortive subsidy with the preservation of certain public aims. Contrary to the WTO Agreement, the SCM Agreement does not contain specific provisions, such as Article XX, that contains a series of ‘general exceptions’ that allow participating states to adopt trade restrictions if necessary for example, necessary to protect public health or the environment,<sup>36</sup> and only by some acrobatic and very much criticized interpretation of the Appellate Body, have states been able to rely on legitimate public aims.<sup>37</sup>

Some further inspiration could possibly come from the so-called ‘new generation’ of free trade agreements (“FTAs”) concluded by the EU, on the legal basis of the provisions introduced by the Lisbon Treaty.<sup>38</sup> As far as subsidies regulation is concerned, some of these FTAs contain similar provisions to the SCM agreement. This is the case in relation to the Comprehensive Economic and Trade Agreement (“CETA”) with Canada, for instance.<sup>39</sup> Others tend to reach beyond the WTO scenario, such as, for example, the EU’s agreements with South Korea (currently in force),<sup>40</sup> Vietnam (pending ratification),<sup>41</sup> Singapore<sup>42</sup> (pending ratification) and Japan (under negotiation).<sup>43</sup> Each of these agreements rely on a wider prohibition on subsidies, which extends to subsidies provided to ailing companies without any credible plan for a return to profit and to unlimited state guarantees. A particularly relevant point in the Brexit context is that these FTAs provide a clear rationale for subsidy control, identified by the fact that subsidies can “negatively affect or are likely to affect competition and trade”.<sup>44</sup> Furthermore, they provide a possible internal remedy, as the parties commit

<sup>35</sup> Notification provisions under the agreement on subsidies and countervailing measures, background note by the secretariat g/scm/w/546/rev.8, 31 March 2017 (17-1796) page: 1/41.

<sup>36</sup> 1994 Agreement, see above fn n. 28.

<sup>37</sup> See, for instance, WTO Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector; Canada – Measures Relating to the Feed-In Tariff Program (Canada – Renewable Energy)*, WT/DS412/R; WT/DS426/R (2012). See further A. Cosbey and C. Mavroidis *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, (2014) 17/1 Journal of International Economic Law, 11.

<sup>38</sup> See Articles 216 – 218 TFEU. For an updated list of EU agreements see European External Action Service’s Treaties Office Database, available at <http://ec.europa.eu/world/agreements/default.home.do> (accessed 20 May 2018). See further L. Borlini and C. Dordi, *Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements* (2017) 23 Colum. J. Eur. L. 551.

<sup>39</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, and the European Union and its Member States (30 October 2016), OJ 2017 L 11/23.

<sup>40</sup> Free Trade Agreement between the European Union and its Member States and the Republic of Korea, OJ 2011 L127/6.

<sup>41</sup> Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (1 February 2016); see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

<sup>42</sup> Free Trade Agreement between the European Union and the Republic of Singapore (April 2018); see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (accessed 20 May 2018).

<sup>43</sup> Economic Partnership Agreement between the European Union and Japan (April 2018); see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1767> (accessed 20 May 2018).

<sup>44</sup> See e.g. Art 11 Singapore Agreement, above, fn. N. 42.

themselves to stop the potential distortive effects of subsidies through the application of their domestic competition law. A final comment is, however, necessary: the influence of EU state aid law is very visible. For instance, Article 107(2) and (3) TFEU on compatibility of aid is repeated *verbatim* in the EU/Vietnam FTA,<sup>45</sup> and in an Annex to the EU/Singapore FTA.<sup>46</sup> In addition, Article 11.7(4) of Chapter 11 of the EU/Singapore FTA provides that the prohibition on subsidies does not apply to subsidies granted as compensation for performing public service obligations, which is a word for word repetition of the *Altmark* formula developed by the Court of Justice in the application of state aid law to services of general economic interest.<sup>47</sup>

The other possible solution (although not as ready-made as some suggest) is to embrace EU-parallel systems that simply replicate the existing EU legal framework. The most debated one is the European Economic Area (“EEA”).<sup>48</sup> The EEA Agreement’s provisions on aid are nearly identical to those in EU state aid law. Article 61 EEA reproduces the definition of aid contained in Article 107 TFEU, which the EFTA Court has interpreted consistently, considering the case law of the Court of Justice, as required by Article 6 EEA.<sup>49</sup> Annex XV to the EEA Agreement contains sectoral binding rules, which are identical to those found in EU law. In addition, the EFTA Surveillance Authority (“ESA”) undertakes a supranational enforcement function, which, aside from a few minor procedural issues, is almost identical to that exercised by the Commission. The near perfect symmetry between the two systems has been recently confirmed by the fact that the ESA has adopted *verbatim* the Commission’s Notice on the notion of aid, amending only a few footnotes.<sup>50</sup>

Apart from the observations as to the disadvantages of being a rule-taker, a position the UK would find itself in as an EEA member, and having no say in shaping EU rules, it should be remembered that the ESA has considerably less experience in handling state aid cases when compared to that of the Commission. In addition, the EFTA Court has a one stop jurisdiction, with no direct action available for companies and governments which wish to challenge adverse decisions, which is possible in the EU system.

Other examples of EU state aid parallel systems are the agreements concluded between the EU and States that either have acceded, or could accede, to the EU.<sup>51</sup>

<sup>45</sup> EU/Vietnam FTA (fn n.41), Chapter 11 (Competition Policy), Section II, Article x.1 (2)

<sup>46</sup> EU/Singapore FTA (fn. n.42), Chapter 11, Annex 11-A, para.2.

<sup>47</sup> Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*. ECLI: EU: C: 2003:415.

<sup>48</sup> Agreement on the European Economic Area, OJ 1994 L 1/3.

<sup>49</sup> See for instance Case E-25/15, *EFTA Surveillance Authority v Iceland* (29 July 2016).

<sup>50</sup> EFTA Surveillance Authority Decision No 3/17/COL of 18 January 2017 amending the procedural and substantive rules in the field of State aid by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area [2017/2413], OJ 2017 L 342/35.

<sup>51</sup> See Association Agreement between the EU, Euratom and their Member States and the Republic of Moldova, OJ 2014 L 260/4; Association Agreement between the EU, Euratom and their Member States and Georgia, OJ 2014 L 261/4; and Association Agreement between the EU and its Member States and Ukraine, OJ 2014 L 161/3.

The rationale of these agreements is to require, as a precondition to full membership, the progressive alignment of national rules with EU state aid rules, and all contain provisions that are nearly identical to those found in EU state aid law.<sup>52</sup> In conclusion, many will not escape the irony that EU state aid rules are the best example as to how to ensure a “*full, UK-wide subsidy control framework*”.<sup>53</sup>

### 3.2. Enforcement Mechanism: ‘*a single UK body for enforcement and supervision*’

The next pillar required for effective control of state aid is the provision of an efficient mechanism for the enforcement of whatever rules have been selected. The Commission, for better or for worse, has undertaken this role by providing Member States with a ‘*locus*’ to test their economic policies, whilst concurrently serving as a guardian of market compliance against the most profligate Member States, ensuring they did not use public money to protect their undertakings. Furthermore, the Commission gradually started involving private actors, mostly competitors, in order to “*increase the detection capacity of the Commission and lend credibility to its claim of neutrality*”.<sup>54</sup>

Some creative work is therefore necessary to create an ‘independent regulator’ which would avoid promiscuous entanglement through the same measure being issued, and then assessed, by the same government department, and to ensure the UK’s internal market, including its devolved authorities, functions smoothly. The UK Government has identified the Competition and Markets Authority (“CMA”) as the likely candidate, because “*this reflects its experience and understanding of markets as the UK’s competition regulator and the independence of its decision-making from Government*.”<sup>55</sup> The CMA has recently announced that it has made two senior appointments, for a Senior Director and a Project Director of State Aid, to assist in preparing for exercising its new state aid powers.<sup>56</sup> The CMA solution has many obvious attractive features, because the CMA’s legal and economic expertise is widely admired. Some more detailed observations can also be made.

First, the task will be comparatively less daunting than could be expected. As mentioned above, the State Aid Modernization Plan implemented by the Commission, with the introduction of the GBER, is *per se* a process of decentralization, as it allows Member States to adopt measures without requiring the Commission’s approval. Fewer notifications obviously mean that

<sup>52</sup> See, for instance, Article 339 of the EU/Moldova Association Agreement (fn n.51), which replicates the wording of Article 107 TFEU.

<sup>53</sup> A. Griffiths, cit. above fn. 25. This does not, however, mean that EU state aid law should be transplanted *en bloc* into UK law, as possible modifications and improvements could be easily inserted. For instance, UK local authorities have usually agreed to advocate a less complex and burdensome approval process than under the current EU regime. See House of Lords Report cit. above fn n.25.

<sup>54</sup> M.P. Smith, *Autonomy by the Rules: The European Commission and the Development of State Aid Policy*, (1998) 36/1 Journal of Common Market Studies, 55, at 63.

<sup>55</sup> Andrew Griffiths MP cit. fn n.25.

<sup>56</sup> See CMA announcement of 10 April 2018, available at: <https://twitter.com/CMAgovUK/status/983681346177585152> (accessed 20 May 2018).

the Commission can focus its resources on cases which are more likely to cause a serious distortion of competition. The same approach can be adapted and embedded into the working of the CMA, whereby public funding to achieve specified horizontal economic policies below a certain monetary threshold would not need to be notified to and investigated by the CMA.

Second, any process of decentralization of state aid control involves certain risks and challenges<sup>57</sup> for the regulator, even one as competent and independent as the CMA. In terms of political capture, it is undisputed that national governments *naturally* tend to support national producers, for various reasons, whether economic, social or just to preserve political consensus. Therefore, political lobbying of the CMA is going to be more intense on state aid measures than competition matters. For instance, the UK government could attempt to use a new “Strategic Steer”, presently used as an instrument available to the Government to inform the CMA of what its long-term goals for competition and growth,<sup>58</sup> in order to indicate some spending orientations that could however later come back in front of the CMA as possible investigations, and eventually be prohibited as incompatible with the domestic regime of state aid control. As far as regulatory capture is concerned, decentralization does, of course, offer a remedy for information problems that do exist between firms and their supranational authority. However, in the state aid context, although beneficiaries of aid tend to be concentrated, such as in competition law, they also tend to be more heterogeneous, and the negative externalities are very wide, potentially impacting all taxpayers,<sup>59</sup> and making the task of national authorities more complicated. To summarise, the CMA’s independence, despite not being in any way disputed, would need to be fully preserved and perhaps even strengthened. As suggested by Bacon, Peretz and Taylor, in a timely and influential report, it may be appropriate for the UK Parliament and the devolved legislatures to appoint key CMA officials.<sup>60</sup> A Panel, or a Board, which would involve

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<sup>57</sup> The accession countries’ experience, whereby national authorities have been entrusted with the duty to align national law with EU law, is arguably of limited relevance as the ultimate goal is still that of matching EU law, under the penalty of non-EU membership. See, however, for some interesting comments on the experience of Croatia, M. Schonberg, *Continuity or change? State aid control in a post-Brexit United Kingdom* [2017] Comp Law, 47.

<sup>58</sup> Department for Business, Innovation and Skills, *Government’s response to the Consultation on the Strategic Steer to the Competition and Markets Authority* (December 2015), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf) (accessed 20 May 2018). The Department for Business, Energy & Industrial Strategy is presently consulting on possible reform of the ‘strategic steer’: see Green Paper, *Modernising Consumer Markets* (April 2018), Chapter 5, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/699937/modernising-consumer-markets-green-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699937/modernising-consumer-markets-green-paper.pdf) (accessed 20 May 2018).

<sup>59</sup> See P. Werner and V. Verouden ‘The Law and Economics of EU State Aid Control’ in P. Werner and V. Verouden (eds), *EU State Aid Control, Law and Economics* (Kluwer 2017), ch. 1.

<sup>60</sup> K. Bacon QC and G. Peretz QC, *Paper on post-Brexit options for State aid* (November 2016), available at: <http://uksala.org/paper-on-post-brexit-options-for-state-aid> (accessed 20 May 2018) and K. Bacon QC, G. Peretz QC and I. Taylor, *Bringing State aid home: Could an effective domestic state aid regime be devised for the UK?* (May 2017), available at <http://uksala.org/bringing-state-aid-home-could-an-effective-domestic-state-aid-regime-be-devised-for-the-uk> (accessed 20 May 2018). See also UK State Aid Law Association, Written evidence to the House of Lords Internal Market Sub-Committee’s Inquiry into Competition Policy

representatives of the devolved legislatures, which could meet perhaps on a regular basis in various parts of the UK, may also dispel fears that a lack of pervasive state aid control could endanger solidarity and equality of spending between the different regions of the UK.

Third, one of the most challenging tasks for the CMA, as for any form of system to control subsidies, would be to choose how to decide whether a certain measure, despite being classified as aid, could still be deemed to be beneficial because it pursues an aim for the 'common good'. In the EU, this task is carried out by the Commission's application of the compatibility grounds listed in Article 107(3) TFEU, which uses the 'common European interest' as a benchmark. In contrast, the CMA must gradually build a UK wide common interest.

A final aspect to be considered is transparency. The EU state aid system, as shaped by the GBER, is heavily reliant on stringent transparency obligations, as all Member States are under an obligation to publish all individual awards of aid granted under the GBER that exceed EUR 0.5 million. Article 10 GBER provides that failure to comply with transparency requirements may lead to a Commission decision that all, or some, future aid measures adopted by the Member State in question are to be notified to the Commission and sanctions are to be ordered.<sup>61</sup> A similar robust system should be introduced by the UK, once again as a guarantee of fairness in public spending decisions, and as a way of alerting competitors and other interested parties to the grant of aid.

### 3.3. *Dispute Settlement*

The final pillar of a UK system of state aid control is to provide a system in order to deal with the inevitable gradual divergence and possible clashes between EU state aid law and the domestic version. This is an issue which goes significantly beyond state aid control, but it is one issue which is key to the whole future EU/UK trade agreement. Therefore, for present purposes, a few observations will need to suffice. First, to prevent and defuse probable future disputes, a Joint Committee comprised of both EU and UK representatives could be set up in order to monitor, review, and possibly settle, the potential divergences on state aid control between Commission practice, EU case law and UK domestic law.<sup>62</sup> Taking the fact that some form of state aid control will be inserted into any

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and Brexit (September 2017), available at: <http://uksala.org/written-evidence-to-house-of-lords-internal-market-sub-committees-inquiry-into-competition-policy-and-brexit> (accessed 20 May 2018). The authors observe that the 'domestication' of state aid control also offers an opportunity for dealing with perceived weaknesses of the EU system in terms of participation of interested parties, competitors and consumers alike in an investigation procedure that is still essentially bilateral between the Commission and the Member State concerned. They also make less specific proposals on, for instance, the implications of CMA decisions to prohibit aid measures and on judicial review.

<sup>61</sup> GBER cit fn n.15.

<sup>62</sup> Article 157 of the Draft Withdrawal Agreement could be used as a model for the future. It provides in particular that that a Joint Committee will "*supervise and facilitate the implementation and application of this Agreement*" and seek "*appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement or of resolving disputes that may arise regarding the interpretation and application of this Agreement*".



future EU/UK trade agreement for granted, when a certain aid measure, which is either granted to a UK or to an EU undertaking, may (to borrow the language of the FTA) “*negatively affect, [or is] likely to affect, competition and trade*”,<sup>63</sup> a mechanism to settle possible disputes will have to be set up. This is indeed one of the most controversial points of the future negotiations. The position of the UK Government is to press for the ‘tailored approach’ even on the question of enforcement, with different models being proposed for different subject areas. As for trade disputes, the preferred option of the UK Government would be arbitration.<sup>64</sup> However, the ‘arbitration’ option seems particularly problematic from the EU perspective. In *Opinion 2/15*<sup>65</sup> relating to the division of competences between the EU and the Member States for the ratification of the EU/Singapore FTA, the Court of Justice held that the State-to-State arbitral mechanism provided in the agreement impaired the ‘autonomy’ of EU law because it removes “*disputes from the jurisdiction of the courts of the Member States or of the European Union*”. Consequently, both the arbitration mechanisms governing dispute settlements between investors and the contracting parties (“ISDS”) and the contracting parties among themselves (State-to-State) fell within the mixed competences of the EU and its Member States,<sup>66</sup> implicitly making the future ratification of a UK/EU agreement containing such a clause more complicated. The Court of Justice’s ‘unfriendly’ approach to arbitration has been confirmed in its recent judgment in *Slovak Republic v Achmea*,<sup>67</sup> where it held that an arbitration clause contained in the Netherlands/Slovakia Bilateral Investment Treaty was incompatible with EU law because it breached its ‘autonomy’.

Although, on a cursory reading of the two decisions, the possible use of an arbitration a settlement dispute mechanism seems to be excluded, it could be observed that in *Opinion 2/15* the State-to-State dispute settlement mechanism was applicable to an area, namely portfolio investments, which fell within the mixed competences of the EU and its Member States,<sup>68</sup> which would not be the case for state aid, a clear-cut area of exclusive EU competence.<sup>69</sup> Analogously, the issue of arbitration impinging on the autonomy of EU law in *Achmea* seems to be limited to the specific investor/State dispute settlement mechanism included in the Netherlands/Slovakia agreement, , as the Court of Justice’s judgment revolved around an arbitration agreement which, in its applicable law clause, expressly attributed to the arbitral tribunal the competence to interpret EU law, thereby manifestly violating the Court of Justice’s monopoly to interpret EU law

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<sup>63</sup> EU/Vietnam FTA cit fn n.41, Chapter II, Article Lxl.

<sup>64</sup> House of Lords European Union Internal Market Sub-Committee cit fn n.25.

<sup>65</sup> *Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore*, ECLI: EU: C: 2017:376.

<sup>66</sup> *Opinion 2/15 id.* paras. 285 to 304.

<sup>67</sup> Case C-284/16, *Slovak Republic v Achmea BV*, ECLI: EU: C: 2018:158.

<sup>68</sup> *Opinion 2/15 cit fn n.65*, para. 305.

<sup>69</sup> Case C-272/12 *P European Commission v Ireland*, ECLI: EU: C: 2013:812. The Court recently clarified that *Opinion 2/15* had to be read in the context of EU/Singapore agreement, as “*there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area*”: Case C-600/14 *Germany v Council of the European Union*, ECLI: EU: C: 2017:296, paras. 67-68.



provided by Article 344 TFEU.<sup>70</sup> Second, and consistently with *Opinion 2/15*, in *Achmea* the Court of Justice seems to have been very concerned with the removal of national courts' jurisdiction over investor/state disputes, as this would have the effect of impairing of the preliminary reference procedure guaranteed under Article 267 TFEU.<sup>71</sup> This issue manifestly does not arise in state-to-state arbitration, which regards inter-state relationships removed *by definition* from the jurisdiction of national courts. Therefore, the Court of Justice's objections to arbitration contained in both *Opinion 2/15* and *Achmea*, seem to apply to investor/state arbitration, and consequently don't rule out state-to state arbitration as a mean of dispute settlement in international agreements concluded by the EU. A variation of state-to-state arbitration is provided in the Moldova, Ukraine and Georgia Association Agreements, which allow the settlement of disputes between the parties to be referred to an arbitration panel, but require the arbitral panel to make a preliminary reference to the Court of Justice where specific questions of EU law arise.<sup>72</sup>

However, the inclusion of a preliminary reference procedure in a UK/EU Agreement does not seem ideal for several reasons. For a start, a preliminary reference system could be a particularly sticky point for the UK. In listing its 'red-lines' relating to a future EU/UK agreement, the UK Government has repeatedly indicated that it will not accept the continuation of the jurisdiction of the CJEU within a future EU/UK trade agreement.<sup>73</sup> Furthermore, despite preliminary references intuitively being a simplification tool, in terms of protecting the "autonomy" of the EU, there is no guarantee that the Court of Justice will be prepared to accept it in any future EU/UK agreement.

Finally, as mentioned above, the aim of these kinds of agreements is the perfect alignment of the national law of a potential accession state with the system of EU law. An alternative and more "political" solution could instead be a "regular" state-to-state arbitration tribunal, coupled with a joint organ providing an interpretation of the provisions of the agreement that is binding on the arbitral tribunal; an example of this mechanism is the Joint Committee in the CETA Agreement.<sup>74</sup>

Another possible dispute resolution mechanism for the future EU/UK relationship in the field of state aid could be the creation of a new international court composed of judges chosen by the EU and the UK. Even if this solution has been soundly rejected in practice by the Court of Justice numerous times,<sup>75</sup> it has, in principle, deemed this to be a viable approach.<sup>76</sup> It remains to be seen,

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<sup>70</sup> Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, paras 204-214.

<sup>71</sup> *Slovak Republic v Achmea* cit fn n.67, para. 35.

<sup>72</sup> See e.g. Article 321 of the EU/Ukraine Association Agreement (fn.52).

<sup>73</sup> See the discussion in House of Lords European Union Internal Market Sub-Committee, *Brexit: Dispute Resolution and Enforcement* HL Paper 130 (3 May February 2018), available at <https://publications.parliament.uk/pa/ld201719/ldselect/lducom/130> (accessed 6 June 2018).

<sup>74</sup> CETA Agreement cit fn n.39, Article 216(4) a.

<sup>75</sup> Opinion 1/09, *European Patent Court* [2011] E.C.R. I-1137, ECLI: EU: C: 2011:123.

<sup>76</sup> Opinion 1/91, *EEA Agreement I* [1991] E.C.R. I-6079, ECLI: EU: C: 1991:490, paras. 40 and 70.

however, based on the past case law of the Court of Justice as to the autonomy of EU law, whether the design of the new investment court, which is contained in the CETA Agreement, and is currently under consideration by the Court of Justice,<sup>77</sup> will survive the scrutiny of the Court. The outcome may shed more light on the feasibility of a court-like system of dispute settlement to arbitrate in disputes between the EU and UK in the field of state aid.

#### **4. The Fourth Quartet: ‘What we call the beginning is often the end. And to make an end is to make a beginning’**

Back in Port Talbot, nearly two years on from the EU Referendum and despite Tata Steel’s plans of new investment, concerns over the future of jobs did not die down. Certainly, EU rules on state aid for the steel sector did not help, because they are very restrictive, being based on a rather draconian principle that no further state aid should be given to rescue or restructure steel firms.<sup>78</sup> It is, however, equally true, and clearly demonstrated in a study from Cardiff Business School, how EU state aid rules were a small part of a larger problem of a market structure based on the presence of heavily subsidized imports from China and of an industrial sector lacking investment in energy efficiency and modern technologies.<sup>79</sup> The same report claims that crashing out of the EU without an agreement and relying on WTO rules would cause the Welsh economy to shrink by between 8 and 10%, equivalent to £1,500-£2,000 per person in Wales.<sup>80</sup>

Rules on the control of public spending are therefore just one aspect of a much more complex set of issues, such as the role the state in a modern economy, of the balance between trade liberalization and the preservation of public interests, and so on. State aid rules should then be taken on their *face value*, as rules that are aimed at preventing governments of the day from passing legislation which only favours certain industries, and invest according to their priorities, and at the same time tailored as to ensure that financial help is granted, but only so far as certain public policies and transparent rules are complied with. Rules that sanction inefficient operators, but that reward innovation and companies that add social value, as well as decisions that preserve regional solidarity. If these principles are embodied in a future UK regime on state aid control, “*all shall be well and All manner of thing shall be well*”.

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<sup>77</sup> Opinion 1/17, *EU/Canada Comprehensive Economic and Trade Agreement*, pending.

<sup>78</sup> European Commission, Communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ 2002 C 152/5, paras. 18-21 and Communication on Rescue and Restructuring aid and closure aid for the steel sector, OJ 2002 C 70/22.

<sup>79</sup> See *EU Transition and Economic Prospects for Large and Medium Sized Firms in Wales*, available at: <https://gov.wales/docs/det/publications/180202-eu-transition-and-economic-prospects-for-large-and-medium-sized-firms-in-wales-en.pdf> (18 (accessed on 6 June 2018)).

<sup>80</sup> Id. pages 82 and 83.